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**STATE OF WISCONSIN
Division of Hearings and Appeals**

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

DECISION

MKATIE BECKETT/149409

PRELIMINARY RECITALS

Pursuant to a petition filed May 13, 2013, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Bureau of Long-Term Support in regard to Medical Assistance, a hearing was held on June 25, 2013, at West Bend, Wisconsin.

The issue for determination is whether the Department of Health Services' Children's Long Term Support Programs correctly discontinued Petitioner's eligibility for Katie Beckett by determining that she no longer meets the institutional level of care eligibility criteria.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street
Madison, Wisconsin 53703

By: Barbara Behrend, MS, RN via written submission
Bureau of Long-Term Support
1 West Wilson
Madison, WI

ADMINISTRATIVE LAW JUDGE:

David D. Fleming
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Washington County.
2. Petitioner has been eligible for Wisconsin Medicaid through the Katie Beckett Program since April 1, 1999. Her eligibility has been under the Nursing Home Level of Care.

3. Petitioner's Katie Beckett eligibility was subject to review in the fall of 2012. Following that review the Department's Division of Long-term Care concluded that Petitioner was no longer eligible for the Katie Beckett program. The date of the discontinuance was to be June 1, 2013.
4. Petitioner is 17 years of age (3/23/96). She is diagnosed with cerebral palsy, ADD, anxiety disorder, and language disorder. Stairs, heights and crowds create panic for her. It is not disputed that she has substantial functional limitations as to bathing, grooming and eating.
5. The reason for the denial of continued Katie Beckett eligibility here is that it concluded that Petitioner does not meet the nursing home level of care (described in Discussion below). There does not seem to be any issue as to the diagnosis or fact that Petitioner does not meet the other levels of care.

DISCUSSION

The purpose of the "Katie Beckett" waiver is to encourage cost savings to the government by permitting children under age 18, who are totally and permanently disabled under Social Security criteria, to receive MA while living at home with their parents. § 49.47(4)(c)1m, Wis. Stats. The Department of Health Services' (DHS) Division of Long Term Care (DLTC) is required to review "Katie Beckett" waiver applications in a five-step process.

The first step is to determine whether the child is age 18 or younger and disabled. The disability determination is made for the Division of Hearings and Appeals Bureau by the Disability Determination Bureau. The Department does not contend that this child is not disabled. After the child clears this hurdle, the second step is to determine whether the child requires a level of care that is typically provided in a hospital, nursing home, or ICF-MR. See 42 C.F.R. §435.225(b)(1). The remaining three steps are assessment of appropriateness of community-based care, costs limits of community-based care, and adherence to income and asset limits for the child. It is the level of care that is at issue here.

Again, the purpose of the Children's Long Term Support Programs is to provide individuals with a community alternative to institutionalization. See *Medicaid Waivers Manual Chapter I Overview and Administration Page I-1*. Among a number of eligibility criteria is the requirement that a child meet an institutional level of care. There currently are four levels of care: hospital, nursing home, psychiatric hospital, and intermediate care facility for the developmentally disabled (ICF-DD).

The DHS has developed policy, found at *Appendix A-10 to Bureau of Long-Term Support Medicaid Home & Community-Based Waivers Manual*, which defines and describes those childhood care levels and contains the requirements needed to qualify for Child's Long Term Support Programs. This manual was updated in February 2011. In brief the levels of care are (all emphasis in the original):

- Hospital Level of Care
A child with a Hospital – Physical Disabilities (PD) Level of Care has needs that are typically met in an in-patient medical hospital setting. The child's medical needs must be chronic, persistent and expected to last at least six months from the date of review. The skilled care needs cannot be acute and of a short-term duration. *The frequency and complexity of the required skilled medical interventions must be so substantial that without these direct, continuous skilled medical interventions, the child is at risk of institutionalization within a long-term, in-patient medical hospital.*
- Psychiatric Hospital Level of Care
The child with a Psychiatric Hospital - Severe Emotional Disturbance (SED) Level of Care has a long-term, severe mental health condition diagnosed by a licensed psychologist or psychiatrist. In addition, this child demonstrates persistent behaviors that create a danger to self or others, requiring ongoing therapeutic support in order to be able to live at home and in the community. *The intensity and frequency of the required ongoing therapeutic support*

must be so substantial that without the support the child is at risk of inpatient psychiatric hospitalization.

A child may be assigned this level of care if the child meets **ALL FOUR of the criteria listed below** for Severe Emotional Disturbance. The criteria are:

1. The child has a **Diagnosis** of a mental health condition; and
2. The child's mental health diagnosis or symptoms related to the diagnosis have existed and are expected to persist for a specific **Duration** of time; and
3. The child is in need of **Involvement with Service Systems** related to mental health support; and
4. The child exhibits **Severe Symptomology or Dangerous Behaviors** at a specific intensity and frequency of required interventions such that without this direct, daily community-based intervention, the child is at risk for institutionalization within a psychiatric hospital.

- Intermediate Care Facility for Developmental Disabilities (ICF-DD or ICF-MR)

A child with an ICF/MR - Developmental Disability (DD) Level of Care has a permanent cognitive disability, substantial functional limitations and a need for active treatment. The level of care criteria is based upon the child having needs similar to people in an intermediate care facility for children with mental retardation (ICF/MR). *The intensity and frequency of required interventions to meet the child's functional limitations must be so substantial that without the intervention, the child is at risk for institutionalization within an ICF/MR.*

A child may be assigned this level of care if the child meets **ALL THREE of the criteria listed below** for Developmental Disability. The criteria are:

1. The child has a diagnosis of a **Cognitive Disability** that substantially impairs learning and that is expected to continue indefinitely; and
2. The child demonstrates **Substantial Functional Limitations** when compared to age appropriate activities that are expected to last a year or longer; and
3. The child has the **Need for Active Treatment**.
(emphasis in the original)

- The Nursing Home Level of Care

The child with a Nursing Home - Physical Disabilities (PD) Level of Care has a long-term medical or physical condition, which significantly diminishes his/her functional capacity and interferes with the ability to perform age appropriate activities of daily living at home and in the community. This child requires an extraordinary degree of daily assistance from others to meet every day routines and special medical needs. The special medical needs warrant skilled nursing interventions that require specialized training and monitoring that is significantly beyond that which is routinely provided to children. *The intensity and frequency of required skilled nursing interventions must be so substantial that without direct, daily intervention, the child is at risk for institutionalization within a nursing home.*

.....

Taken from Appendix A-10 to Bureau of Long-Term Support Medicaid Home & Community-Based Waivers Manual

I also note that the agency has the burden of proof in a benefit discontinuance case. *See, e.g., State V. Hanson*, 98 Wis. 2nd 80 (Wis. App. 1980). That burden is the preponderance of the credible evidence. If the agency presents a prima facie case supporting its position the Petitioner may rebut that case.

There is no contention that Petitioner meets the hospital, psychiatric hospital or ICF-DD levels of care so it is the nursing home level of care that is at issue here. Again, she has been at the nursing home level of care.

The Manual, at Appendix 10, states the following regarding the nursing home level of care:

...

A child may be assigned this level of care if the child meets **BOTH of the criteria listed below** for Physical Disability. The criteria are:

1. The child has a **Diagnosis** of a medical/physical condition resulting in needs requiring long term care services; and
2. The child requires skilled **Nursing Interventions and/or has Substantial Functional Limitations** requiring hands on assistance from others throughout their day.

...

Appendix 10 of Manual at page 22 (emphasis in the original).

The diagnosis criteria is not an issue here, rather it is the nursing intervention/substantial functional limitation criterion that is involved. There are two standards and a person must meet one or the other to qualify:

2. SKILLED NURSING INTERVENTIONS AND/OR SUBSTANTIAL FUNCTIONAL LIMITATIONS

The child must meet **ONE** of the two Standards (I-II) described below.

STANDARD I: Skilled Nursing Interventions PLUS Substantial Functional Limitations

The child must demonstrate **BOTH** a need for Skilled Nursing/Therapeutic Intervention **PLUS TWO** substantial functional limitations (**A PLUS C, OR B PLUS C**):

A. Needs and receives at least **ONE** Skilled Nursing Intervention listed below that must be performed **daily** and is reasonably expected to continue *at least six months*.

OR

B. Needs and receives at least **TWO** Skilled Nursing/Therapeutic Interventions listed below that must be performed at least **weekly** (*or at the frequency noted below*) and are both reasonably expected to continue *at least six months*.

...

STANDARD II: Substantial Functional Limitations

The child must have substantial functional limitations requiring daily direct hands on assistance in at least **FOUR** of the seven specific areas listed below that are reasonably expected to last for *at least one year*. There is no requirement of skilled nursing or therapeutic interventions for this Standard.

1. **Learning:** A 30% (25% if the child is under one year of age) or greater delay or a score of at least 2 (1.5 if the child is under one year of age) standard deviations below the mean based on valid, standardized and norm referenced measures of aggregate intellectual functioning.

2. **Communication:** A substantial functional limitation in communication is defined as a 30% (25% if under one year) or greater delay or a standard score of at least 2 (1.5 if under one year) standard deviations below the mean on valid, standardized and norm referenced measures of BOTH expressive and receptive communication functioning.

3. **Bathing:** Refer to APPENDIX B. This Appendix describes the degree of deficit required in bathing to meet a substantial functional limitation based on the child's age.

4. **Grooming or Dressing:** Refer to APPENDIX B. This Appendix describes the degree of deficit required in grooming or dressing to meet a substantial functional limitation based on the child's age.

5. **Eating:** Refer to APPENDIX B. This Appendix describes the degree of deficit required in eating to meet a substantial functional limitation based on the child's age.

6. **Toileting:** Refer to APPENDIX B. This Appendix describes the degree of deficit required in toileting to meet a substantial functional limitation based on the child's age.

7. **Mobility:** Refer to APPENDIX B. This Appendix describes the degree of deficit required in mobility to meet a substantial functional limitation based on the child's age. The inability to run or to move long distances or between environments related to stamina or ease of movement is NOT a mobility deficit.

NOTE: Minor to moderate global delays in several of the seven areas listed above does not meet the Substantial Functional Limitation Criterion. A significant delay in an area not listed above, such as a behavioral concern or the inability to participate in extra-curricular activities, also does not meet the required Substantial Functional Limitation. *Appendix 10 of Manual at pages 23-26 (emphasis in the original).*

The Department appeared by letter to explain the discontinuance of Petitioner's Katie Beckett benefits. (Ex # 2). That letter provided no analysis of Petitioner's case under Standard II, indeed, it makes no mention of it at all. From the record, however, it seems that this has been the basis for her approval for most, if not all, of the time she has been Katie Beckett eligible.

Again Standard II requires that Petitioner have substantial functional limitations in 4 of the 7 listed areas. The evidence is clear that she needs assistance with bathing, grooming and eating. She does not meet the cognitive test and while she needs help with expressive communication the evidence does not indicate that she meets the receptive prong of that area. This leaves mobility and makes this case a very close call.

Petitioner does ambulate without adaptive equipment. Nonetheless, she is very anxious in any sort of crowd. In school she has to leave classes early so as to be alone in the halls, can't participate in fire drills or assemblies, etc. and has an aide assigned to her to help with that aspect of mobility. If she is expected to be in a new setting her parents must take her to the new place a head of time to familiarize her. Without these protective measures Petitioner would be a secure setting. Again, this makes this case a very close call but without contrary argument I am concluding that Petitioner has substantial functional limitation as to mobility. I am, therefore, reversing the discontinuance of her Katie Beckett benefits.

CONCLUSIONS OF LAW

That the available evidence demonstrates that Petitioner continues to meet the level of care required to continue her Katie Beckett eligibility.

THEREFORE, it is

ORDERED

That this matter is remanded to the agency with instructions to restore Petitioner's Katie Beckett eligibility. This must be done within 10 days of the date of this decision.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

APPEAL TO COURT

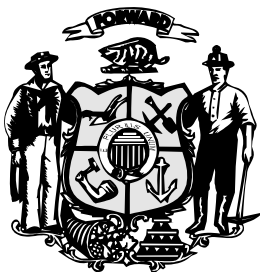
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,
Wisconsin, this 31st day of July, 2013

\sDavid D. Fleming
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on July 31, 2013.

Bureau of Long-Term Support
Division of Health Care Access and Accountability